APPENDIX A
LEGAL REVIEW OF LIABILITY ISSUES

CECC-K (27-40a) 22 October 1997

MEMORANDUM FOR CECW-ON

SUBJECT: Legal Review of Liability Issues Associated with Authorizing the Use of Chemical Aerosol for Ranger Protection

You have asked me for my views regarding the scope of authority under 16 U.S.C. 460d, whether or not rangers are "officers" within the meaning of the United States Code, and whether authorizing the use of chemical aerosols would increase government or personal liability for injuries sustained by visitors.

1. Statutory Sources of Authority-- Are Rangers "Officers?".

The promulgation and enforcement of regulations for the use of water resource development projects is provided for by 16 U.S.C. Section 460d. In relevant part, that statute provides that the Secretary of the Army may establish regulations for the public recreational use of water resource development projects. The law also provides that "[a]ll persons designated by the Chief of Engineers for that purpose shall have the authority to issue a citation for violation of the regulations.... nothing contained herein shall be construed as preventing the arrest by any officer of the United States, without process, of any person taken in the act of violating said regulations."

In contrast, other laws conferring law enforcement authority on federal agencies are more specific. 16 U.S.C. 1a-6 provides in part that National Park Service employees may be designated to "...maintain law and order and protect persons and property within areas of the National Park System...." Park Service rangers are specifically authorized by law to "carry firearms and make arrests without warrant...." Similarly, Forest Service employees "shall have the authority to make arrests for the violation of the laws and regulations relating to the national forests...." (This provision also contains wording identical to the last quoted section of 460d above.) Agencies exercising typical law enforcement authority appear to uniformly have specific arrest or law enforcement authority within their enabling statutes. See, e.g., 8 U.S.C. 1357 (Immigration officers' authority); 21 U.S.C. 878 (Drug Enforcement officers' authority.)

33 U.S.C. section 413 is the only provision which authorizes individuals employed by the Corps to exercise law enforcement powers. That section provides in part that "for the better enforcement of [regulations under the Rivers and Harbors Act] and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements...shall have power and authority to swear out process and to arrest and take into custody, with or without process, any person... who may commit any of the acts or offenses prohibited by the said sections...." The arrest authority conferred in the Rivers and Harbors Act has never been implemented by the Corps, and in any event would be insufficient to support the exercise of that authority for violations occurring above the ordinary high water mark of navigable

waters.[1]

The legislative history of 16 U.S.C. 460d indicates that citation authority was added to the statute in 1970, apparently in response to problems with littering and dumping occurring on fee-owned lands at flood control projects. The provision was not added because of specific concerns over law enforcement problems at these projects. S. Rep. No. 91-1422 p. 116 (91st Cong., 2d Sess.) Therefore, because of this background and the fact that Congress has repeatedly demonstrated that it is capable of including specific arrest authority where it deems warranted, interpreting section 460d as authorizing implied arrest or law enforcement authority would be inappropriate. It appears that Congress only authorized the Corps to designate individuals with specific limited powers to issue citations to enforce the regulations protecting water resource projects.

In conclusion, because the "persons" who can be designated to issues citations do not have arrest authority under 460d, I cannot conclude that rangers are included in the definition of "officers" (who do have arrest authority) under the last-quoted portion of the statute.[2]

2. Government Liability for Injuries Sustained by Visitors Subjected to Chemical Spray.

The United States' liability for injuries or deaths suffered by members of the public is determined under the Federal Tort Claims Act (hereinafter FTCA), 28 U.S.C. Sections 1346(b), 2671 et seq. 28 U.S.C. 2674 provides that the United States shall be liable to the same extent as any private individual under state law, and liability is similarly determined by the law of the state in which the action complained of occurred.[3] Defenses to lawsuits may be determined under state law, or they may be provided as a matter of federal law under the Act.

The Corps' initial decision to authorize the use of Mace or some other aerosol

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[1] There is also arrest authority for the nonpayment of recreation fees, but the Corps has similarly declined to authorize its employees to utilize this means to ensure fee collection. See 16 U.S.C. 460*l*-6a(e).

[2] The definition of "officer" in 5 U.S.C. 2104 does not appear to have much relevance to this discussion, for several reasons. Title 5 of the United States Code deals primarily with the government's organization and personnel practices. The definition of "officer" for determining liability issues is instead contained in 28 U.S.C. 2680(h).

[3] In this connection, it should be noted that funds to pay such damage awards do not come out of the Corps' budget. The money is instead paid out of the so-called "Judgment Fund" established by statute and administered by the Department of Justice and Treasury Department.

irritant would be protected by the FTCA's"discretionary function" exception to liability. This doctrine bars

> "(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved be abused."

In brief, what this means is that if the agency exercises its discretion in determining that public and ranger safety would be furthered by allowing the defensive use of chemical spray, this decision will not subject the government to liability. Dalehite v. United States, 346 U.S. 15, (1953), reh. den., 347 U.S. 924 (1954). Similarly, the Corps' decision to limit use of the spray to self-defense only, or to allow the ranger to refrain from administering aftercare to a sprayed visitor, should also protect the United States from liability under this defense. This would hold true regardless of the level of injury (including death) sustained by the sprayed individual.

A second defense is provided by 2680 of the FTCA, which provides specific exceptions for certain types of claims. In pertinent part, the government is immune from liability under 2680(h) for

> "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, ...*Provided*, That, with regard to the acts or omissions of investigative or law enforcement officers of the United States Government. The provision of this chapter...shall apply to any claim arising...out of assault, battery, false imprisonment false arrest.... For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." (Emphasis added.)

Under this section, the United States accepts no legal responsibility for the common-law torts of its employees, unless those employees are law enforcement officials. Therefore, an individual who stated a cause of action based on assault or battery could recover damages against the government under this section only if the assault stems from the actions of a covered officer. As noted above, because the Corps has not acted to formally allow rangers to perform law enforcement duties, this section would allow the United States to dismiss any lawsuit brought against it for the actions of a ranger in using chemical spray on a visitor.

A plaintiff could attempt to bypass this restriction and hold the United States liable for injuries, by claiming that the Corps negligently failed to adequately train and supervise

the ranger involved in the incident. There is an apparent split of authority in the courts over this question, with some holding that training and supervision does not prevent the immunity from attaching, because the cause of action still "arises from" assault and battery. Therefore, this type of claim is also subject to dismissal. See Naisbitt v. United States, 611 F.2d 1350 (10th Cir. 1980).

In contrast, some courts have characterized training and supervision as instances where the government's negligent conduct has served as an independent cause of the injury, and suit has been allowed to proceed. DeLong v. United States, 600 F. Supp. 331 (D. Ak. 1984) (suit survived motion to dismiss because plaintiffs alleged that the government caused the injury by failing to notify Marine guards that civilian workers were authorized to be in the area where they were subsequently assaulted.) See also, Sheridan v. United States, 487 U.S. 392 (1988). If a plaintiff is able to establish that being sprayed was the result of the Corps' negligent conduct in supervising or training the ranger, the United States could be found liable for the damages sustained by the individual. Senger v. United States, 103 F.3d 1437 (9th Cir. 1996). Suppose that the Corps trains a class of rangers that the proper way to employ chemical spray is to completely subdue the attacker by emptying the cannister, thereby causing permanent injury to the attacker. The ranger's actions are within scope, but it is evident that the government has improperly taught the class how to use the spray. In some jurisdictions, the case would be dismissed under 2680, while in others it would not.

3. Personal Liability for Injuries Sustained by Visitors Subjected to Chemical Spray

A. *Common-Law Liability*

An individual attempting to sue a federal employee in his or her individual capacity might proceed on a claim for assault or battery. However, it has long been established that federal employees are immune from liability for so-called common-law torts as long as they are acting within the scope of their employment when the act complained of occurred. Barr v. Matteo, . In 1988, the Supreme Court modified the absolute immunity test when it decided Westfall v. Erwin, 484 U.S. 292. In Westfall, the Court held that it was no longer sufficient for the employee to establish that he or she was acting within scope of employment, but now had to also demonstrate that the action complained of was discretionary in nature. Id. at 297-98. In response to this decision, Congress modified the FTCA by inserting an exclusivity of suit provision and eliminating any requirement that the employee be exercising discretion. 28 U.S.C. 2679(b)(1) now requires a plaintiff attempting to sue a federal employee to name the United States as the sole defendant, even if the suit will be subject to later dismissal because of another exception to liability in the FTCA, such as 2680(h). United States v. Smith, 499 U.S. 160, 165-67 (1991). Thus, from a procedural standpoint, suit would be filed against the individual in his or her official capacity, the government would move to substitute the United States as the defendant in the case, and then file a motion to dismiss the complaint because the government cannot

be liable for assaults committed by personnel who are not law enforcement officials, as discussed above.

The key question in determining whether the employee is entitled to immunity is whether or not the conduct complained of occurred within the scope of employment. That issue will be determined by the law of the state where the incident occurred. Heuton v. Anderson, 75 F.3d 357, 360 (8th Cir. 1996); Garcia v. United States, 62 F.3d 126, 127 (5th Cir. 1995); Schrob v. Catterson, 967 F.2d 929, 934 (3d Cir. 1992). While the law of each state on scope of employment is beyond the reach of this paper, in general, the following three elements will be determinative of the question: 1) the employer authorizes the action or it is incidental to authorized duties; 2) the action occurred during the time and space limits of the employment; and 3) the action was motivated at least in part by the objective of furthering the employer's business. Accordingly, if the Corps promulgates a policy allowing the use of chemical spray, a ranger who is following the policy and uses chemical aerosol spray in a defensive manner to ward off an attack by a visitor should incur no liability for any injury or death sustained by the visitor. Cf., Krzyske v. C.I.R., 548 F. Supp. 101 (D. Mich. 1982), aff'd, 740 F.2d 968 (6th Cir. 1984). If, however, the ranger deviates from the policy, he or she will no longer have immunity from liability, because the action complained of will not have occurred within the scope of employment. In this case, the ranger would be responsible for retaining counsel to defend the lawsuit and paying any resulting judgment from his or her personal funds.

In sum, I do not believe that there would be a significant increase in governmental liability under the FTCA for injury or death caused by an authorized use of chemical spray against a visitor, with the possible exception of negligent training and supervision noted above. Rangers are not law enforcement officers for whose actions the United States has waived sovereign immunity, so the government would have to be substituted as the defendant under 2679(b)(2), and the case should then be dismissed because of 2680(h). The ranger would not be liable in his or her official capacity because of the absolute immunity for in-scope actions, but could face personal liability for using the spray outside the scope of employment.

B. *Constitutional Liability.*

A more difficult problem is presented by the issue of potential personal liability for so-called Constitutional torts. This cause of action was endorsed by the Supreme Court after a series of "no-knock" raids carried out by federal agents in the early 1970's. In Bivens v. Six Unnamed Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), federal agents entered a house and arrested an individual for drug violations. Bivens later sued the agents individually, alleging in essence that the arrest was made without probable cause. The Supreme Court held that Bivens had stated a valid cause of action, because the Fourth Amendment provides rights which are protected not only from direct governmental infringement, but also from the actions of individuals acting under color of

federal law. Subsequent case law has upheld the validity of causes of action based on the Fourth Amendment's prohibition against warrantless search and seizure of property and the Fifth Amendment's assurances that due process of law will be observed before an individual is deprived of his property, life or liberty.[4]

The United States cannot be substituted as the defendant in this type of case, because Congress has not waived the government's sovereign immunity for constitutional torts. See 28 U.S.C. 2679(b)(2) (remedies against the United States shall not be available for a claim "...which is brought for a violation of the Constitution of the United States....") However, where a Constitutional tort has allegedly been committed, the employee is entitled to a defense of "qualified immunity." Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). This protects a federal employee if his or her "conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known..." Id. at 818.

To my knowledge, there is no constitutionally recognized right to attack another person with impunity, and there should be no legitimate expectation that such an assault will not meet with resistance. A review of cases involving *Bivens* decisions for Fourth and Fifth Amendment violations by federal employees does not indicate that the use of physical means to detain or deter a subject, when an authorized part of their job duties, will result in liability unless clearly excessive force is used. Therefore, I do not believe that there is substantial risk that a Constitutional tort case could be filed and won against a ranger who has used chemical aerosol in self-defense. Again, however, an aggressive use of the spray could support a Constitutional claim.

4. Common Law Rights, Scope of Employment, and the Defense of Third Parties.

While the foregoing discussion has focused on the potential liability of the government and the ranger for in-scope and out-of-scope actions, it is important to note that a ranger acting outside the scope of employment may nevertheless be protected from liability by various common-law and statutory rights. For instance, assume a situation where a ranger encounters a domestic assault in progress, intervenes and uses mace to subdue the attacker, then detains the perpetrator until police arrive because the ranger fears for the safety of the victim. The attacker later sues the ranger for assault, battery,

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[4] Other Constitutional rights can be the subject of lawsuits against individuals, but they are not of concern for purposes of the present discussion. They include the first Amendment's free speech and freedom of religion guarantees, the Fourth Amendment's prohibition on unreasonable searches and seizures, the Sixth Amendment's right to counsel, and the Eighth Amendment's protection against cruel and unusual punishment.

and false imprisonment.

As a matter of common law, an individual may defend him or herself from attack and may intervene to assist a third party who is being assaulted. Beard v. United States, 158 U.S. 550 (1895); C.f., Harris v. Scully, 779 F.2d 875 (2d Cir. 1985) . The latter right is generally prescribed by state statue, although some states allow common-law justification as a defense to the charge. Generally, the only constraint on intervening to assist another is that 1) the intervenor would have been justified in using force in self-defense if he himself had been attacked, 2) the intervenor has a reasonable belief that the victim would have been justified in using force to repel the attacker, and 3) the intervenor believes he must act to protect the third person. Model Penal Code, Section 3.05 (ALI).

Although rangers do not possess statutory arrest authority, the power to effect citizens arrests has long been recognized:

> There have been citizen arrests for as long as there have been public police--indeed much longer. In ancient Greece and Rome, and England until the nineteenth century, most arrests and prosecutions were by private individuals....Arrest has never been an exclusively governmental function.

Spencer v. Lee, 864 F.2d 1376, 1380 (7th Cir. 1989). Therefore, even in non-scope cases, although the ranger would incur liability for attorney's fees in defending the civil (or criminal) charges, the ranger should still be successful in avoiding liability or conviction.

6. Conclusions. In summary, based on the above analysis, the specific answers to your questions are as follows:

c.1) and 2)-- The ranger would have no personal liability for a common-law assault and battery charge or a negligence action for damages, so long as the incident complained of occurred within the ranger's scope of employment. There is a slight possibility that a ranger could face being sued for infringing an individual's rights under the Fifth Amendment. Here, however, the ranger would only incur legal expenses in defending the action, since he or she should be entitled to judgment based on qualified immunity. (The severity of a person's reaction to the spray does not alter potential liability.)

3) The laws regarding immunity referenced in ER 1130-2-420 would be applicable if the agency authorizes the use of chemical spray.

4) and 5). USACE would not be directly liable for damages in a tort action, and the United States could only be found liable in some jurisdictions if the spraying were determined to be negligent, or if inadequate training or supervision had independently caused the damages.

d.1) There is no common-law requirement or duty to assist an individual who has been injured as a result of another person's self-defensive actions. Further research would be required to ascertain whether any of the states have laws imposing such a duty on users of chemical spray,[5] but I have serious doubt that any of them do. It would be inconceivable that a law could require a petite woman who has warded off a large and aggressive male attacker to then turn around and assist him or incur liability for her failure to do so. (Additionally, I have been unable to find any cases in which failure to provide such assistance has been the basis for the imposition of liability, at least where the person using the spray has not been a law enforcement official.) I suspect that the reference material's discussion of aftercare presupposes that the individual utilizing the spray is a law enforcement official. In such a circumstance, the individual would be taken into custody, and it is the custodial relationship, not the spraying itself, which would impose a duty to care for the affected individual. Nevertheless, in light of the recent adverse publicity generated by the use of chemical repellants, it would be advisable to periodically review the literature and develop guidance about when and how to administer medical care if it appears that the individual has suffered an unusually severe medical reaction to the substance.

2). It is the ranger's prerogative (and indeed, is required by current policy) to retreat from the situation and wait for the appropriate medical or law enforcement personnel to arrive.

3). If the person who has been sprayed poses a continuing threat to the ranger or to others, the ranger's duty is still to retreat until law enforcement officers arrive. Further intervention in the situation in order to prevent violence to a third party would be considered to be outside the scope of employment under present policy.

Supplemental Question 1). While taking a person into protective custody does not have the same legal consequences as making an arrest, the effect of both actions is to deprive a person of his or her freedom of movement. Although there is a common-law right to make a citizen's arrest, I have not been able to find a corollary right for an ordinary citizen to detain a person simply to protect the welfare of the detainee. Unless such a right exists, detention of an individual, which is currently against Corps policy, could subject a ranger to personal liability because it would be outside the scope of employment. Therefore, the most prudent course of action, as noted in the two answers immediately preceding, is to withdraw and wait for the arrival of medical or police personnel.

2. Taking an individual into protective custody could conceivably increase the United States' liability for injuries caused by chemical spray. Again, this is because the act of

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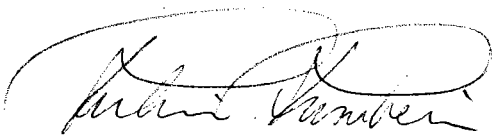
[5] A brief computer search for the terms mace, pepper, capsicum or chemical spray turned up a number of state laws dealing with the subject, but none of them addresses a duty of aftercare.

exercising custody may trigger a duty to provide medical assistance to the individual which, if negligently administered, could give rise to a lawsuit under the FTCA. Cf., City of Canton v. Harris, 489 U.S. 378, 388 n.8 (1989).

3. If the Corps implemented a policy authorizing rangers to employ chemical spray for self-defense purposes only, the subsequent failure of a ranger to employ the spray to assist a visitor being assaulted should not give rise to an increase in governmental liability. The use of the spray for this purpose will place the ranger outside the scope of employment and subject him or her to potential personal liability for assault and battery.

4. The definition of permissible "defensive purposes" for which rangers are authorized to act is a policy issue, not a legal one. Therefore, this particular question should be addressed by CECW-ON.



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